IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 881.

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

Motion to Enlarge the Scope of the Argument.

D. ROGER ENGLAR,
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Respondents.

Motion to Enlarge the Scope of the Argument.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On May 10, 1943, this Court granted a petition for certiorari in this case, but only as to the fifth question presented in the petition, which is as follows (p. 18):

> "V. Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to in personam liability only?"

The petitioners respectfully move this Court to enlarge the scope of the argument so as to permit argument of

the fourth question presented by the petition, which is as follows (p. 17):

> "IV. If a mere showing of loss by fire is sufficient to throw the burden of proof of negligence on the owner of cargo, is not this burden sustained by showing that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was still in the experimental stages?"

1. This question of law is presented squarely on the findings below. The courts below found that the cargo of fish meal in which the fire broke out was known to the carrier to create a fire hazard (R. 2043, 2045, 1984, 1986); that its carriage was still in the experimental stage (R. 2045, 2049, 1984); that a safe method of carrying such a large quantity was not established until the year after this disaster (R. 2041, 2045, 2049, 1984); that the stowage of this cargo on the vessel was negligent and rendered her unseaworthy (R. 2048, 1985, 1988); and that this improper stowage was the proximate cause of the fire and of the losses sustained by the petitioners (R. 2048, 1985, 1989). Notwithstanding their finding that the carrier had knowledge of the danger involved in the carriage of this cargo, the lower courts held that the owners of cargo had not sustained the burden of proof resting on them under the Fire Statute, (46 U. S. Code, Sec. 182), but that they must go further and prove knowledge on the part of the carrier that its employees had not corrected the dangerous condition (R. 2046). The burden thus imposed on the cargo owners has no counterpart in any other jurisdiction, and this decision is squarely in conflict with the law as applied in other Circuits. In all other jurisdictions, a carrier who has knowledge of a condition involving danger of fire is under a personal obligation to see that the condition is corrected. This obligation is not satisfied merely by the appointment of competent subordinates. Put in another

way, if the carrier has knowledge of a condition which involves the danger of fire and this condition is not corrected, the inaction is chargeable to the carrier whether he has personal knowledge of it or not; the rule of *respondeat superior*, which is conditionally suspended by the Fire Statute (46 U. S. Code Sec. 182), comes into operation once more when the carrier learns of the danger of fire.

2. While failure of this Court to grant a writ of certiorari may not give rise to any presumption as to the merits of a case, we submit that if the Court takes up the present case and does not hear argument on the above question, it will be generally regarded as an affirmance of the decision below on this point and will not only result in a continuance of the present rule in the Second Circuit, but will probably result in that rule being adopted in the other Circuits where the contrary rule has heretofore been applied. We submit that a question of this importance, which has never been either discussed or decided in any opinion of this Court, should not be disposed of without a hearing and argument.

3. In support of our statement that the burden imposed upon the cargo owner in this case is without precedent, we call the Court's attention to the specific findings of the lower courts that the carrier had knowledge of numerous earlier fires in similar cargoes on its own vessels (R. 2043, 2045, 1984, 1986), and that it did not pass this information on to the Lloyd's surveyor, one Fegen, (R. 2043, 1986), whom it employed to supervise the stowage (R. 2043, 1985). The carrier offered no evidence as to Fegen's actual knowledge of these earlier fires. Nevertheless, the lower courts held that the cargo owners must fail in any event because they could not prove what effect this information would have had on Fegen's judgment if it had been passed on to him.

We quote from the opinion of the Circuit Court of Appeals as follows:

> "Besides, *even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference; i.e.*, that his knowledge of the charterer's past experience would have led him to discard 'rice ventilators.' Since the *claimants have the burden of proving 'neglect'* under this statute—unlike the Limited Liability Statute—*they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A. 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2)" (R. 2046). (Italics ours.)

As appears from the foregoing quotation (R. 2046), the lower courts here held that the carrier, which knew from actual experience of the fire hazard involved, could divest itself of all responsibility by delegating its duties to a Lloyd's surveyor, without taking any steps to ascertain whether he had knowledge of the dangers involved in this experimental traffic, and without making any inquiries as to what, if any, steps he took to avoid the danger of fire. This ruling is contrary to the law as applied in all other Circuits where the question has arisen. Specifically, the opposite rule was applied by the Circuit Court of Appeals for the Ninth Circuit in *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622, 623, and by the Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843, 845.

The *Bank Line* case, *supra*, is peculiarly pertinent, for in that case, as here, the carrier claimed immunity under the Fire Statute because it had employed a Lloyd's surveyor to pass on the seaworthiness of the vessel; and there, as here, the carrier failed to inform the surveyor

of material facts within its knowledge. We quote from that opinion as follows:

> "It is contended, on the part of the respondent, that the certificate of seaworthiness issued by Lloyd's surveyor at Calcutta was sufficient to absolve the owner from any neglect with regard to the condition of the *Poleric*. We cannot agree with this contention. The owner was in possession of information respecting the history of the vessel's voyage from Greenock to Calcutta that should have been communicated to Lloyd's surveyor. This was not done.
>
> The diligence required is 'diligence with respect to the vessel, not in obtaining certificates'. *The Abbazia* (D. C.) 127 F. 495; *Compagnie Maritime Francaise v. Meyer* (C. C. A.) 248 F. 881." (25 F. (2d) at p. 845).

In addition, the court held that where a carrier has knowledge of "a condition involving a danger of fire", it is under a duty to see that proper precautions are taken, and that neglect in preventing "the very thing that did occur, the breaking out of the numerous fires * * * is directly chargeable to the owner". The court said (p. 845):

> "In this case, as in the case of *The Elizabeth Dantzler*, 263 F. 596, we are of the opinion that, taking into consideration the nature of the cargo and climatic conditions at Ponta Delgada, the fire was reasonably to be feared and provided against, if not to be expected. All these facts were in possession of the owners of the *Poleric*; their agents were on the ground, and no steps taken to prevent the fire. *Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results. The Eastern Glade* (C. C. A.) 13 F. (2d) 555; *Willfaro-Willsolo* (D. C.) 9 F. (2d) 940." (Italics ours.) (25 F. (2d) at pp. 845-6.)

The foregoing quotations disclose a definite, clear-cut conflict between the Second and Fourth Circuits as to the

conditions under which a carrier is entitled to exemption from liability by the Fire Statute. In the Fourth Circuit, when the cargo owner establishes actual knowledge on the part of a carrier of conditions which may reasonably be expected to result in a fire, the carrier, in order to obtain the exemption granted by the statute, must then show not merely that it appointed proper subordinates, but that its subordinates were fully informed of the danger and took proper steps to avoid it.

In the Second Circuit, on the other hand, notwithstanding that both of the lower courts concurrently found in the present case that proper steps to avoid the danger were not taken by the carrier's subordinate, they held that the delegation of duty to the subordinate ... ved the carrier of all responsibility, and this although the subordinate admittedly had not been informed by the carrier of its adverse experiences in the carriage of fish meal. The lower courts held in this case that there was no duty upon the carrier to inform its subordinate of its unfavorable experience, but that cargo owners must show affirmatively that the subordinate to whom the carrier had delegated the stowage of the cargo was ignorant of the carrier's previous adverse experiences and that such ignorance was a proximate cause of the loss.

WHEREFORE, petitioners move that the scope of the argument be enlarged to permit presentation to this Court of the Fourth Question contained in the petition.

Dated, New York, N. Y., May 18, 1943.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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RESPONDENTS' ANSWER TO PETITIONERS' REPLY BRIEF

GEORGE C. SPRAGUE,
Counsel for Respondents.

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RESPONDENTS' ANSWER TO PETITIONERS' REPLY BRIEF

The question of what were "the exact words employed by Mr. Justice Miller" in the opinion of this Court in *Walker* v. *Transportation Co.*, (No. 110—December Term 1865) is put in issue by the last paragraph on page 2 of petitioners' reply brief. That case is reported in 3 Wallace 150, and in 18 L. ed. 172. I had mistakenly assumed that there was no difference between the two reports and, after comparing petitioners' quotation from the opinion at page 45 of the petition with the report as contained in 18 L. ed.

172, asserted that they had misquoted the language (respondents' brief p. 11).

Upon receipt of petitioners' reply brief, I compared the opinion as reported in 3 Wallace 150 with the opinion as reported in 18 L. ed. 172, and found a substantial difference between them in the language of the paragraph quoted. Petitioners' quotation of one of the two sentences contained in that paragraph is correct as reported at 3 Wallace 150, 153 but incorrect as reported at 18 L. ed. 172, 174. My quotation of all three of the sentences of that paragraph is correct as reported at 18 L. ed. 172, 174 but incorrect as reported at 3 Wallace 150, 153 in respect to two sentences. My statement that petitioners misquoted the language of the opinion *as reported at 3 Wallace 150, 153*,[1] was, therefore, an error.

In order to remove all doubt as to what this Court actually said in the paragraph under discussion, I requested the Clerk to furnish me with a certified copy of the original opinion in *Walker* v. *Transportation Co.*, supra, from the archives of the Court and he has done so under date of April 27, 1943. This certified copy of the opinion is printed as an appendix hereto with the paragraph under discussion emphasized for convenient reference. This certified copy clearly shows that this paragraph was incorrectly reported at 3 Wallace 150, 153 and correctly reported at 18 L. ed. 172, 174; the emphasized paragraph is identical with the quotation in respondents' brief (p. 11) except that the word "first" is spelled out in the certified copy and abbreviated ("1st") in the brief. The conclusion drawn in respondents' brief (p. 11) from that quotation is inescapable.

Petitioners' statement (reply brief p. 3) concerning the *Getsuyo Maru*, which sailed from Yokohama on June 28, is misleading. As the Circuit Court of Appeals below said:

> "Nor could Okubo have done anything when he learned that the cargo of the 'Getsuyo Maru' had

[1] Emphasis throughout brief and appendix is mine unless otherwise noted.

heated. That vessel reached New York on July 29, the day that the 'Venice Maru' reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the 'Venice Maru' left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly" (R. 2046).

That Okubo did not supervise Fegen, but left the stowage to him as an expert, is shown by the following quotation from the same opinion:

> "The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; *he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage*" (R. 2041-43).

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

May 3, 1943.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 140—December Term, 1865

Charles H. Walker et al., Appellants, vs. The Western Transportation Co.	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice Miller delivered the opinion of the Court.

Plaintiffs filed their libel in personum [sic], for the value of wheat shipped on board the defendant's ship Falcon, at Chicago, to be delivered at Buffalo.

Defendant admits the receipt of the wheat on board the vessel, and the failure to deliver, and sets up three defences.

1. That the wheat was destroyed by fire, which was not caused by the design or neglect of defendant. This article is framed to meet the act of March 3, 1851.

2. That the wheat was received on board, with reference to the terms of the bills of lading usually given by respondent, which contained an exception of the dangers of navigation fire, and collison [sic]. No proof was offered under this article.

3. That it was received with reference to the forms of bills of lading in general use on the lakes, which contained an exception of perils of navigation, perils of the sea, and other equivalent words; and that by general and well known usage and custom, these words included loss by fire.

In setting forth the custom, in the 11th article of the answer, it is stated that the custom is to construe those words as an exemption from liability for loss by fire, unless it occurs by the negligence or misconduct of the owner of the vessel, his agents or servants. It then avers that the fire did not occur through the negligence or misconduct of respondent, or its servants or agents.

1. Is the owner of a vessel used in the trade on the lakes liable, independent of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel?

The answer to this question depends upon the construction to be given to the act of March 3, 1851, (9 U. S. Statutes 635,) entitled an act to limit the liability of ship owners, and for other purposes. That the owners of vessels were liable at common law in the case stated, had been decided by this court in the case of the New Jersey Steam Navigation Co. vs. The Merchants' Bank, 6 Howard, 344. That decision led to the enactment of the statute of 1851. This statute has been the subject of consideration in this court before, in the case of Moore and others vs. The American Transportation Co., 24 Howard, 1. The policy of the act, its relation to the act of 53 George III, and other British statutes, are there discussed; and it is decided—that being the principal question before the court—that the act embraces vessels engaged in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship owner's common law liability for every thing but the act of God and the king's enemies. We think that it goes so far as to relieve the ship owner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

The language of the first section is, that no owner or owners, of any ship or vessel, shall be liable to answer for any loss or damage which may happen by reason or means

of fire on board said ship or vessel, "unless such fire is caused by the design or neglect of such owner or owners." The owners are here released from liability for loss by fire in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

When we consider that the object of the act is to limit the liability of *owners*[2] of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section of the same act. This enacts that nothing in the preceding sections shall be construed to take away, or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

We are therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

2. But there is a proviso to the first section of the act of 1851, which says, "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It is claimed by libellants, that the answer of the

[2] Emphasis appears in opinion.

defendants sets out a contract which makes the owners liable in case of loss by fire, from the negligence of their officers and agents; and that by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence. On this question, testimony was taken on both sides.

The respondent undoubtedly does set out, in the 11th article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defences we have mentioned, by libellants, in the district court in 1856, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the circuit court, in 1860, after the case of Moore vs. The Transportation Co. had decided that the act of 1851 was applicable to the lake trade, the libellants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it. No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated, and the libellants admit the contract, and the construction given to it by custom.

But it is obvious that there is nothing in the *language*[3] of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the

[3] Emphasis appears in opinion.

negligence of his servants in case of loss by fire. Can usage add to words which do not express it, a liability from which the act of Congress declares the ship owner to be free? It was the common law, or immemorial usage which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract, which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom. In other words, an express contract.

We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851.

The construction which we have already given to that act, requires that the judgment of the circuit court, dismissing the libel, shall be affirmed, with costs.

A true copy:

Test:

CHARLES ELMORE CROPLEY, Clerk,
Supreme Court of the United States.
By HAROLD B. WILLEY
Deputy.

[Seal of the Supreme Court
of the United States]